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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	
	)	CC Docket No. 96-115
Telecommunications Carrier's Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information	)	

REPLY COMMENTS OF THE COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY

I. INTRODUCTION AND SUMMARY

The Computer Professionals for Social Responsibility ("CPSR") respectfully submits these reply comments on the Notice of Proposed Rulemaking issued by the Federal Communications Commission ("Commission") regarding carriers' use of Customer Proprietary Network Information ("CPNI").[1]

CPSR is a public interest alliance of information technology professionals and others concerned about the impact of computer technology on society. CPSR works to influence decisions regarding the development and use of computers. As technical experts, CPSR members provide the public and policy makers with realistic assessments of the power, promise and limitations of computer technology. As a group of concerned citizens, CPSR directs public attention to critical choices concerning the applications of computing and how those choices affect society. Founded in 1981, CPSR has over 1,500 members and 22 chapters nationwide.

[1] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* Notice of Proposed Rulemaking, FCC 96-221 (released May 17, 1996) ("NPRM").

When Congress enacted section 702 of the Telecommunications Act of 1996 (the "1996 Act") it explicitly recognized both the privacy interest in CPNI and the competitive value of this information to telecommunications carriers.[2] Prior to the 1996 Act, many states -- and the Commission -- recognized the importance of regulating the use of residential customer CPNI and fashioned regulations restricting use of CPNI by telephone companies and third parties.

The NPRM requested comments on a number of crucial issues regarding the use of CPNI. CPSR submits these reply comments to add support to those parties who advocated safeguarding the privacy rights of customers. Many commenters urged the Commission to require frequent, written notice statements and explicit written authorizations from consumers, with which CPSR concurs. Contrary to the implications of some parties, CPSR does not believe that privacy and competition are inversely related, and wants to assure the Commission that even the strongest privacy protections will not stand in the way of competition.

II. CUSTOMER PRIVACY RIGHTS IN CPNI MUST BE PROTECTED

The 1996 Act ushers in a new era for the telecommunications industry. These quick-paced changes in today's communications industry require regulators, carriers and consumers to adopt a new framework for the concept of telecommunications.

The ubiquitous nature of communications necessitates a change in policy about many aspects of phone service. The changing nature and importance of CPNI

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 702 (1996) (to be codified at 47 U.S.C. § 222). Unless otherwise indicated, these comments will use CPNI to refer generally to personally identifiable subscriber information. CPSR believes that access to aggregate CPNI data, as required by the *Computer III* decision, should continue to be readily available to new entrants and competitors.

is a secondary effect of deregulation and new technologies. Today, CPNI consists of far more than just a name, address, and telephone number.[3] As our society becomes increasingly mobile, and consumers spend more time "on-line," on the phone, carrying phones with them, or using pagers and wireless modems, CPNI will begin to tell stories about a person's habits and whereabouts. Telecommunications carriers generally are in a unique position to gather detailed information about the population: by looking at what services a consumer subscribes to, what types of options they sign up for, what numbers they call and when they call, a phone company, or any third party, can easily piece together a picture of the customer's daily life.

Deregulation of the telecommunications industry and increased competition should not be used as excuses to eliminate all privacy constraints on telecommunications carriers. Perhaps more than ever, in a highly competitive and deregulated environment, issues like CPNI must be carefully addressed by the Commission. Privacy, which consumers take for granted in many ways, is an intangible good that the marketplace has difficulty valuing or recognizing. This type of economic "externality" is a classic reason for government regulation.[4]

Additionally, strong privacy protections are in no way inconsistent with vigorous competition. In fact, by requiring all carriers to abide by the same strong privacy regulations limiting the use of CPNI, the Commission will give control to

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[3] CPSR does not want to belittle the important privacy interests in billing name and address information. Consumers strongly believe that they have a right to keep that information private. High rates of unlisted phone numbers is evidence of this attitude. *See* Paula C. Squires, "Message Received: Bell Won't Sell Names; It bows to barrage of privacy complaints," Richmond Times-Dispatch, July 7, 1995 (describing controversy over Bell Atlantic plans to sell residential customer lists to outside marketers).

[4] This is the theory behind most of the environmental regulations in place today. Privacy, as a social issue, is often compared to the environmental movement of 20 to 30 years ago.

the consumer and, for the first time, creates a level playing field for the industry.[5] Privacy advocates and industry groups can urge companies to become more privacy-aware; competitors, in turn, will have a motive to create strong privacy policies and use those policies in marketing and advertising campaigns. Consumers can be made more aware of privacy issues and begin demanding responsibility by companies for privacy abuses.

However, guidelines and industry policies are not be enough. Consumers must have enforceable rights to protect their privacy. Congress granted consumers rights in this area, and now the Commission must create the enforcement mechanism.

III. THE COMMISSION SHOULD NOT PREEMPT STRONG PRIVACY RULES FASHIONED BY STATE REGULATORS

Paragraph 17 of the NPRM raises the issue of federal preemption over state CPNI regulations. Although the 1996 Act creates limited national standards for the telecommunications industry, it is not a wholesale preemption of state authority. In fact, the Act leaves many decisions and oversight duties with the states. CPNI rules should follow this same pattern. While CPSR supports strong FCC rules restricting access and use of CPNI, we also believe states should be allowed to go beyond these rules in protecting consumers' privacy. Obviously, Congress recognized that even in a deregulated environment, state regulators will have their finger more closely on the pulse of local concerns.

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[5] The 1996 Act is substantially different from earlier FCC rules, which permitted use by the collecting carrier unless the end user affirmatively objected, but required that another carrier obtain affirmative end user permission to obtain access to the information. That approach to CPNI privacy both failed to protect consumer privacy and created competitive inequities

Federal preemption doctrine allows the federal government, including regulatory agencies, to preempt state regulations which directly conflict with a federal regulation or statute or which interfere with the achievement of a substantial federal policy.[6] Yet states remain free to adopt stronger regulations if they do not conflict with federal goals. Despite recent court decisions affirming Commission preemption of state regulations on Caller ID and CPNI for enhanced services,[7] preemption is not a necessary or proper approach to Commission regulation of CPNI.

It is clear from the 1996 Act that the fundamental federal CPNI policy is protecting customer privacy. In Sections 222(c)(3) and 222(e), Congress permitted carriers to make aggregate data and subscriber list information readily available However, Section 222(a) imposes an express duty on all carriers to protect the confidentiality of proprietary information. Similarly, Congress put consumers in control of their personally identifiable CPNI data by requiring customer approval *before* the data can be released or otherwise used by a telecommunications carrier.[8] Consequently, there can be no "conflict" between the privacy goals of the Act and the strongest state rules on CPNI.

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[6] *E.g., California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

[7] *See California v. FCC*, 75 F.3d 1350 (9th Cir. 1996). Here, the court ruled that the FCC had supported its burden of establishing that state regulation of default blocking would interfere with the Commission's goal of making interstate Caller ID services available so that consumers can "seamlessly" use their Caller ID services with long distance calls. For CPNI, in contrast, there is no interstate issue involved in the collection and use of personally identifiable CPNI (except to the extent that long distance carriers need the data for billing purposes, which is a permissible "related use" under the Act). There is no issue regarding compatibility of state CPNI regulations with technology or implementation of a particular service. Thus, preemption of Caller ID regulation does not imply that the Commission has the power, or justification, to preempt state CPNI rules that provide broader privacy protection than that available under the 1996 Act.

[8] 47 U.S.C. §§ 222(b), 222(c)(1), 222(c)(2).

Section 222 does not expressly preempt, or expressly authorize FCC preemption of, state CPNI regulations. Unlike other areas of the Act, Congress could have—but chose not to—override State authority on privacy matters.[9] Thus, because state CPNI protections that exceed those required by Section 222 do not conflict with the Act and are consistent with the Act's privacy focus, preemption is inappropriate.

IV. "TELECOMMUNICATIONS SERVICE" SHOULD BE NARROWLY DEFINED

Section 222(c)(1) limits a carrier's use of CPNI to only those purposes related to the "telecommunications service" from which the information is derived. In Paragraph 22 of the NPRM, the Commission lists categories of services which might apply to this provision, and proposes to allow carriers to use CPNI without customer consent only within each category. CPSR supports those comments which urge the Commission to use a very narrow reading of the definition of "telecommunications service" in order to provide the clearest rules for carriers and to provide the highest level of privacy protection.

Proper statutory construction compels such a narrow reading. As suggested by the comments of both Consumer Federation of America ("CFA") and the Information Technology Association of America ("ITAA"), Congressional intent in

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[9] Where Congress intended to preempt State authority, it did so explicitly. For instance, Section 276(c) explicitly preempts inconsistent State regulations with regards to payphone operations, and Section 253(a) preempts state or local rules that "prohibit, or have the effect of prohibiting," the provision of any interstate or intrastate telecommunications service. New Section 261 regarding interconnection is similarly specifics that "[n]oting in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications act of 1996,..." Section 252 gives states the authority to approve interconnection agreements and Section 254 allows states to create additional universal service funding mechanisms, if they do not conflict with federal regulations. These examples clearly show that Congress gave States broad authority to implement many provisions of the Act

the 1996 Act was to protect privacy and limit misuse of CPNI by carriers.[10] A reading of the statute which creates very narrow categories, thereby limiting permissible disclosures of CPNI, would comport with these goals. Also, Congress spoke of a "telecommunications service" in the singular, indicating Congressional intent that a discrete unit of services to be used

This interpretation follows common sense as well. Privacy regulations traditionally limit the "secondary uses" of the information. This means that information gathered for one purpose can only be used for related purposes, or for unrelated purposes only with the customer's authorization.[11] While consumers understand that telecommunications carriers need certain basic information to bill for a service, as use of this information becomes more and more tangential to the original purpose for collecting it, consumers will begin to feel their privacy has been invaded.

CPSR agrees with the Commission that as technologies develop to enhance competition, categories of services and the services themselves will change.[12] However, discreet, narrowly defined services will most likely form the building blocks of any "bundled" service. Therefore, the Commission should set regulations to limit use of CPNI among narrow telecommunications services.

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[10] *See* CFA Comments at 2; ITAA Comments at 3

[11] United States Department of Health, Education and Welfare, *Records, Computers and the Rights of Citizens: Report of the Secretary's Advisory Committee on Automated Personal Data Systems* (GPO 1973) (commonly known as the Code of Fair Information Practices).

[12] *See* NPRM ¶ 23.

V. STRONG CUSTOMER NOTIFICATION IS A FOUNDATION FOR ALL OTHER RIGHTS OVER CPNI

Affirmative consumer rights are useless if consumers do not know about them. Despite all the publicity surrounding the 1996 Act, it is doubtful many consumers know about, let alone fully understand, their rights about CPNI. In fact, most telecommunications customers probably do not even realize their personal information is a commercially valuable commodity that needs protection.

Privacy advocates find a general lack of awareness about privacy rights. While an end user might well object to selling his or her information, most end users will not realize—without some form of notice—that this is an issue. The 1996 Act requires customer approval before CPNI is used by the collecting carrier or released to others. The Act delegates to both the Commission and states the question of what type and form of notification carriers must use before asking for and obtaining approval. Clearly, the Act's approval requirement would be useless to protect consumers if end users do not first have notice of their rights. Therefore, CPSR agrees with CFA that clear, "consumer-friendly" notifications should be mandatory to protect consumers' privacy rights.[13] To be effective, these notices to the consumer must be in writing. While a bill insert provides some level of notice, many customers routinely discard bill inserts. Therefore other methods, such as placing the notice directly on the bill, or creating a separate mailing, would be even more effective.[14] In addition to written notices on bills, when customers first sign up for service, an oral notification about their rights to restrict use of CPNI should be given.

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[13] *See* CFA Comments at 5-7.

[14] *See* California Public Utilities Commission Comments at 10 regarding use of bill inserts for customer notification programs.

These notices should not be couched in legal jargon or generalities. The Commission should provide a standardized notice that carriers must use, or at the very least the Commission must specify certain criteria for the notice. Notices should be in standard size type, list the specific types of information which could be released (not the technical, legal definition), give examples of possible uses of CPNI and have a clear recitation of the options consumers will have to protect their CPNI. Written notices must be repeated at least annually and oral notices should be repeated whenever the customer changes or adds services. These frequent notifications will also allow consumers to change their election for the use of their information.

Notice requirements should also be applied to third-party users. The 1996 Act already requires them to obtain the customer's written approval to request CPNI from a carrier. At the time of the request for written authorization, third parties should also be required to clearly explain what types of information they will be asking for from the carrier and what rights customers have to limit the scope of the request.

VI. STATUTORY INTERPRETATION AND CONGRESSIONAL INTENT MANDATE WRITTEN CUSTOMER AUTHORIZATIONS

Separate from the requirement of written notice to consumers about their rights, is the issue of customer authorization for carriers to release or otherwise use CPNI data. Section 222 states that "except as required by law or with the approval of the customer" telecommunications carriers can use CPNI only in very limited ways. The Commission asks parties to address the issue of customer approval for uses of CPNI by third parties and for use by the carrier which collected the data from the end-user.

We support those commenters, for instance the CFA and ITAA, which urge the Commission to require affirmative, written consent for all secondary uses of CPNI, even by the carrier that originally collected the information. CPSR objects to the Commission's suggestion in Paragraph 29 of the NPRM that carriers may "choose" to obtain written authorization from the customer. Although Section 222(c)(1) did not specify what type of approval a carrier must obtain before using CPNI for a purpose unrelated to that for which it was collected, the statute makes it clear that requiring written authorization is permissible. In Section 222(c)(2), Congress mandated affirmative written consent prior to carrier release of CPNI data to third parties, obviously believing that such a requirement would not be overly burdensome or onerous. Therefore, in order to create the highest level of privacy rights, and consequently to ensure a "level playing field" for competition, incumbent LECs, IXCs and all other carriers who collect this information directly from the consumer should also be required to obtain affirmative *written* consent before using CPNI for services unrelated to that service from which the information was collected.

In addition to broad requirements on written authorization, the presumption by carriers should be that CPNI is confidential unless a customer otherwise elects. CPSR strongly disagrees with Pacific Telesis' suggestions that if a customer fails to "opt out" they should be deemed to give their approval for carrier use of CPNI.[15] CPSR believes that carriers must institute an "opt-in" program wherein CPNI cannot be shared *unless* a customer has affirmatively released the data. The 1996 Act is unambiguous on this point. The statute says that carriers can use CPNI for unrelated purposes *only* with the "approval of the customer." It simply does not

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[15] *See* Pacific Telesis Comments at 7.

allow carriers the discretion to use CPNI unless the customer objects. Accordingly, the Commission is required to implement "opt-in" rules under the Act.

The consent form itself must be very specific as to potential uses of the data and include a time frame within which consent is valid. The authorization form must be a separate mailing, it cannot come with other sales material. It must be very convenient to use. Consumers must have the ability to change their election, with both third parties and the carrier who collected the information, at any time. One can think of any number of scenarios where a person would unexpectedly need to protect such personal information, such as learning they were being stalked or starting a new job that exposed the person to risks to personal safety, as for example in law enforcement.

A. Written Customer Authorization Must Be Required for Affiliate Sharing

A related issue is that of affiliate sharing. As telecommunications carriers grow larger, merge and diversify their services, sharing of CPNI amongst the various divisions and affiliates of a company may lead to uses of collected data other than as required to provide the service for which the data was collected. The concept of "secondary use" puts more emphasis on whether the use is related to the original purpose of collection, rather than *who* has actually obtained the data.[16] By limiting use without permission to that required to provide the service, the 1996 Act recognizes that consumers have a privacy right even against the collecting carrier, as well as that carrier's affiliates. Affiliate sharing thus poses the potential for impermissible uses under the Act. In order to prevent this potential invasion of privacy, affirmative written consent must be required for affiliate sharing, unless

[16] *See* Section III *supra*

the telecommunications company can prove the use of the information is necessary to providing the service for which it was originally collected.

B. Oral Consent is Ineffective and Could Lead to Inadequate Notice and Customer Confusion

In Paragraph 30 of the NPRM, the Commission requests comment on whether outbound telemarketing programs can be used to obtain customer approval to use CPNI. CPSR strongly objects to this proposal and supports the CFA, ITAA and CPUC comments, which provide many strong arguments against oral authorization. Oral consent presents a ready opportunity to take advantage of consumers. It is easy to envision slick telemarketers holding a customer's privacy rights hostage for some "opportunity of a lifetime " The misuse of telemarketing organizations to oversell services or "slam" [17] customers by smaller interexchange carriers is widespread,[18] and should not be extended to private CPNI information.

Generally, even if done "by the book," oral consent is clearly less effective than written consent would be in protecting privacy rights. It would be very difficult to audit or maintain oversight of CPNI uses if oral consent were the rule. Customers must be given a chance to consider their options, and the pressure of telemarketing does not allow for careful thought Something as important as consumers' privacy rights cannot be left to bargain during a telemarketing phone call. Oral approval is especially problematic when more than one adult is in the

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[17] "Slamming" is the practice of switching a customer's long distance service without their authorization. In response to thousands of complaints by consumers over slamming from telephone sales calls, the FCC created very strict rules regarding the use of telemarketing to sell phone services. *See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,* Report and Order, 10 FCC Rcd. 9560 (1995)

[18] Incumbent local exchange carriers are not immune to misused of oral marketing contacts with subscribers. For instance, in California, Pacific Bell was fined for overselling services over the phone to customers who spoke only limited English.

household and they have different views about the privacy of CPNI. Phone companies cannot be allowed to benefit from finding the person who will give them the least resistance on that day.

VII. CARRIERS MUST HAVE STRONG TECHNICAL SAFEGUARDS IN PLACE TO PROTECT CPNI

CPSR supports the Commission's tentative conclusion, in Paragraph 35 of the NPRM, that all telecommunications carriers must establish effective safeguards to protect against unauthorized access to CPNI. Although few of the opening comments addressed this issue, several large government agencies, for instance the IRS and the Social Security Administration, have discovered that the strictest rules and regulations cannot stop a determined person from gathering data illegally. Carriers must also put in place technical safeguards to prevent misuse of CPNI data, since none is immune from flaws in its security systems. Thus, both dominant and non-dominant carriers should continue to be subject to this requirement. As this data become more detailed it will also become more valuable, and therefore more tempting to unauthorized users.

CPSR would be wary of any rule which forces carriers to pick a particular method or safeguard for technical protection of CPNI. Technology is changing too rapidly to put carriers into such a straightjacket. Just as the Commission presented a list of certain threats to data, perhaps it could suggest general technologies—such as rotating passwords, encryption, firewalls—which would serve as a starting point for companies.

CPSR strongly urges the Commission to consider enforcement mechanisms for the rules on technical safeguards. Consumers look to these carriers as fiduciaries for their data. Therefore, the carriers must be responsible for protecting this information.

CONCLUSION

CPSR urges the Commission to adopt rules that implement Section 222 by requiring written notice and affirmative customer authorization for release of CPNI, and by permitting states to fashion CPNI safeguards that exceed the federal minimum requirements.

Respectfully Submitted,

COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY

By: _____
Audrie Krause, Executive Director
Computer Professionals for
Social Responsibility
P.O. Box 717
Palo Alto, CA 94302
415.322.3778
415.322.4748 fax

Jeffrey Blumenfeld
Glenn B. Manishin
Christine A. Mailloux
BLUMENFELD & COHEN
1615 M Street, N.W., Suite 700
Washington, D.C. 20036
202.955.6300
202.955.6460 fax

Of Counsel

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CERTIFICATE OF SERVICE

I, Cynthia Miller, do hereby certify on this 26th day of June, 1996, that I have served a copy of the foregoing document via messenger to the parties below:

Cynthia Miller

Chairman Reed Hundt
Federal Communications Commission
1919 M Street, NW
Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, NW
Room 802
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW
Room 832
Washington, DC 20554

Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street, NW
Room 844
Washington, DC 20554

Janice Myles
Common Carrier Bureau
1919 M Street, NW
Room 544
Washington, DC 20554

International Transcription Services, Inc.
2100 M Street, NW
Suite 140
Washington, DC 20037